United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1900

To be Argued by
PATRICK A. SWEENEY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B

Docket No. 74-1900

P/S

THOMAS DWEN, as President of the Suffolk County Patrolmen's Benevolent Association and THOMAS DWEN, Individually,

Plaintiff-Appellee,

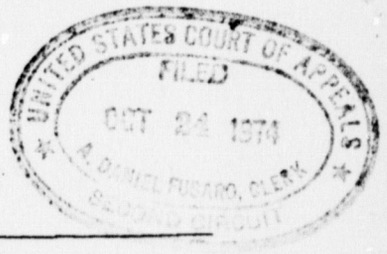
-against-

JOHN L. BARRY, Commissioner of the SUFFOLK COUNTY POLICE DEPARTMENT,

Defendant-Appellant.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF



PATRICK A. SWEENEY, Of Counsel
GEORGE W. PERCY, JR.
Suffolk County Attorney
Attorney for Defendant-Appellant
Office and P. O. Address
691 Fort Salonga Road
Northport, New York 11768
Telephone: (516) 757-6515

TABLE OF CONTENTS

INDEX TO CASES

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

- X

THOMAS DWEN, as President of the Suffolk County Patrolmen's Benevolent Association and THOMAS DWEN, Individually,

Plaintiff-Appellee,

-against-

Docket No. 74-1900

JOHN L. BARRY, Commissioner of the Suffolk County Police Department,

Defendant-Appellant.

- X

INTRODUCTION

Plaintiff initially commenced an action in the Federal District Court to declare invalid a regulation of the Suffolk County Police Rules and Regulations which, in substance, placed restrictions on the length of a police officer's hair. Chief Justice Mishler, in November of 1971, dismissed the suit and denied a preliminary injunction. On appeal, the United States Court of Appeals for the Second Circuit reversed the District Court's dismissal and remanded the case for trial.

After a trial before Chief Justice Mishler, the Court

rendered a decision dated May 30, 1974, which in substance stated that the defendant had failed to establish a legitimate interest and that, therefore, the hair regulation was an arbitrary restraint upon individual police officers and, hence, unconstitutional.

A notice of appeal to this Court was filed by the defendant on June 18, 1974.

POINT I

SINCE THE LOWER COURT FOUND AFTER A TRIAL ON THE MERITS THAT HAIR LONGER THAN THE REGULATION ALLOWS APPEARS TO BE A SAFETY HAZARD, THE LOWER COURT WAS IN ERROR IN CONCLUDING THE HAIR REGULATION WAS AN ARBITRARY LIMITATION AND A PURPOSELESS RESTRAINT, THUS VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

When the instant case was previously reviewed by this Court, the Court established a specific guide for the trial, and that was that ". . . the Commissioner has the burden of establishing a genuine public need for the regulation". (Appendix, p. 87). Since this Court has not reviewed the case on the merits, the issue before the Court is what exactly is the "genuine public need" or "legitimate state interest" that the Suffolk County Police

must show to outweigh the individual's right to wear his hair any way he wants.

Chief Justice Mishler heard testimony in the District Court to the effect that certain lengths of hair present a safety problem. Indeed, he concludes on page 6 of the Appendix that ". . . pony tails present a hazard to law enforcement officers and are a proper subject for regulation". It is submitted to this Court that since the undisputable proof was that at least a portion of the regulation dealt with safety and the Court found factually that it was a valid subject for regulation that the appellants had sustained the burden of proof imposed by this Court, i.e., to show a genuine public need for the regulation. There was further uncontroverted testimony that hair length would interfere with a police officer operating a police vehicle during a pursuit chase. A police officer's safety is certainly within the ambit of "public need", and any regulation which relates to his safety served a legitimate state interest. A similar case involving safety as a legitimate state interest was upheld in the Federal District Court for the Eastern District by the Hon. Mark A. Constantino involving New York City Firemen. The Court's holding was basically that if one of the reasons for a hair regu-

lation is that hair in excess of the length prescribed by the regulation presents a safety hazard to the fireman, then the regulation is a valid exercise of state power and is not an unreasonable interference with the foreman's constitutional rights. (Kamerling, et al. v. O'Hagan, U.S. District Court, Eastern District, July 29, 1974, Civil Action No. 74 C 1061). A similar regulation was also upheld in Nassau County with relation to firemen and the basis for the decision was also safety. (Olszewski v. Council of Hempstead Fire Department, 70 Misc. 603, 334 N.Y.S. 2d 504).

POINT II

UNIFORM STANDARDS OF GROOMING INCLUDING THE REGULATION OF HAIR LENGTHS IS A LEGITIMATE STATE INTEREST

The thrust of the appellant's other argument in the plenary hearing before Chief Justice Mishler was that the length of hair of a police officer became part of the uniform, i.e., as much as the requirement to wear a blue uniform, black socks, etc. Chief Justice Mishler, in his original determination, had stated that, "Uniformity of dress is part of the discipline of the local police department." (Appendix, p. 97). Now the Court states in the decision being appealed that, "Uniformity for uniformity's sake

does not establish a public need." (Appendix, p. 7). It was the Police Commissioner's contention in the original proceeding before Chief Justice Mishler that uniformity in grooming was important to the morale of the Department, and even on the plenary trial this was still the Commissioner's contention. Indeed, the safety of not only the police officer is at stake, as mentioned in Point I, but also the safety of the public. While Chief Justice Mishler states the uniform supplies the necessary identification for police work, ". . . any hesitation in seeking assistance or cooperation with officers because of the unique position of policemen could mean the difference between life and death. The public should not have to guess who is and who is not a bona fide officer of the law. Uniformity of dress prevents such problems. Grooming standards, as part of uniform regulations, are a legitimate state interest. The desire of the police officer for individuality in the selection of his hair style and length is outweighed by the legitimate state interest in immediate public recognition of bona fide police officers." (Stradley v. Anderson, 349 F. Supp. 1120, 1123 (D. Nebraska) 1972, Affirmed, 478 Fed. Rep. 2d 188; Greenwald v. Frank, 70 Misc. 2d 632, 334 N.Y.S. 2d 680, Affd. 40 App. Div. 2d 717, 337 N.Y.S. 2d 225, Affd. 32 N.Y. 2d 862, 346 N.Y.S. 2d

529 (1973); Austin v. Howard, 39 App. Div. 2d 76, 332 N.Y.S. 2d 434).

Further, when the Stradley case was appealed to the United States Court of Appeals for the Eighth Circuit, Circuit Judge Lay stated that:

> "One may argue that how one wears his hair has little to do with whether an officer might effectively apprehend criminals or otherwise fulfill his assigned mission as a policeman. This misses the mark. The critical factor is that police officialdom deems it necessary that the officer be well disciplined and that as part of that internal discipline, he be required to maintain a neat appearance. The degree of that appearance, as long as it is not arbitrary or unreasonable, should not be the Court's concern."
> (Stradley v. Anderson, 478 Fed. Rep. 2d 188, 191 (8th Circ., 1973).)

The police officer has a unique occupation in that the mere presence of the uniformed police officer is a visible sign of law enforcement. He is set apart from other public employees because of a uniform. While Chief Justice Mishler states that it would not be a legitimate state interest to have uniformity for uniformity's sake, this Court should recognize the plain fact that uniformity in the dress and grooming of a police force is not for its own sake but for the safety of the public at large. If the Police Commissioner cannot promulgate grooming regulations which the police officer must comply with, and that not only includes the instant hair regulation but also basic cleanliness grooming, you erode away the very concept of the purpose of the uniformed police officer. If there is an infringement on the individual officer's constitutional right to wear his hair as he sees fit, then it also follows that the Police Commissioner has no authority to regulate the color of the uniform, the color of the shoes, the color of the socks, the way the hat should be worn on the head, etc. Is it not also an infringement on the police officer's constitutional rights that when he hangs up the uniform to go home he still is required to carry a weapon, thereby in a sense still being on duty?

The argument is simple. If you cannot prescribe grooming regulations, then it follows that you cannot constitutionally dictate the color of the uniform, thereby destroying the purpose and distinction of the uniformed police officer.

CONCLUSION

THE TRIAL COURT'S DECISION SHOULD BE REVERSED AND THE COMPLAINT DISMISSED

Respectfully submitted,

GEORGE W. PERCY, JR.
Suffolk County Attorney
Attorney for Defendant-Appellant
Office and P. O. Address
691 Fort Salonga Road
Northport, New York 11768
Telephone: (516) 757-6515

PATRICK A. SWEENEY
Of Counsel

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

- X

THOMAS DWEN, as President of the Suffolk County Patrolmen's Benevolent Association and THOMAS DWEN, Individually,

Plaintiff-Appellee,

-against-

JOHN L. BARRY, Commissioner of the SUFFOLK COUNTY POLICE DEPARTMENT,

Defendant-Appellant.

AFFIDAVIT OF SERVICE

Docket No. 74-1900

- X

STATE OF NEW YORK, COUNTY OF SUFFOLK) ss.:

MARGARET P. DE NOTO, being duly sworn, deposes and says that she is over twenty-one years of age and employed by the County Attorney in the within proceeding. That on the 4th day of October, 1974 she served the within Appellant's Appendix and Appellant's Brief upon RICHARD T. HAEFELI, ESQ., of counsel to LEONARD D. WEXLER, ESQ., attorney for plaintiff-appellee in this proceeding, at 28 Manor Road, Smithtown, New York, the address designated by them for that purpose, by depositing three copies of each enclosed in a post-paid properly addressed wrapper in an official depository under the exclusive care and custody of the United State post office department within the State of New York.

Sworn to before me this 4th day)
of October, 1974.)

Margaret P. De Noto

Patrick A. Sweeney
PATRICK A. SWEENEY
NOTARY PUBLIC, State of New York
No. 52-9263710, Qualified in Suffolk Co.
Term Expires March 30, 1976